

FEB 14 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1977

_____ **76-1117**

No. _____, Misc.

ARCHIE PELTZMAN, PETITIONER,

v.

IRVING R. KAUFMAN,
CHIEF JUDGE, RESPONDENT.

MOTION FOR LEAVE TO FILE PETITION FOR
WRIT OF MANDAMUS, AND BRIEF IN
SUPPORT THEREOF

Archie Peltzman
Petitioner, Pro Se,
c/o Eve Katz
2483 W. 16th St.
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| "The Supreme Court & all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions & agreeable to the usages & principles of law." | |
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| "In all the Courts of the U.S., seamen may institute & prosecute suits & appeals in their own manes & for their own benefit for wages, or salvage, or for the enforcement of laws enacted for their health or safety without prepaying fees or costs or furnishing security thereof. (June 25, 1948, C646 62 Stat. 955) | |
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No. _____, Misc.

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IRVING R. KAUFMAN,
CHIEF JUDGE, RESPONDENT.

MOTION FOR LEAVE TO FILE PETITION
FOR WRIT OF MANDAMUS

The petitioner moves the Court for leave to file the petition for a writ of mandamus hereto annexed; & further moves that an order & rule be entered & issued directing the Honorable The United States Court of Appeals For the Second Circuit, & the Honorable Chief Judge, Irving R. Kaufman of that Court, to show cause why a writ of mandamus should not be issued

against them in accordance with the prayer
of said petition, & why your petitioner
should not have such other & further re-
lief in the premises as may be just and
meet.

Archie Peltzman
Petitioner, Pro Se
c/o Eve Katz
2483 W.16th St.
B'klyn, N.Y. 11214

IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1977

No. _____, Misc.

ARCHIE PELTZMAN, PETITIONER,

v.

IRVING R. KAUFMAN,
CHIEF JUDGE, RESPONDENT.

PETITION FOR A WRIT OF MANDAMUS TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT, & THE
HONORABLE IRVING R. KAUFMAN, CHIEF
JUDGE OF THAT COURT.

OPINIONS BELOW

No opinion was filed by the Court of
Appeals.

Petitioner was informed by letter
(Appendix a) January 17, 1977, from pro se
clerk that Circuit Court would not docket
appeal without fifty dollar fee or an oath

of forma pauperis.

No opinion was filed by District Judge in denying a Rule 60(b) motion to vacate a final judgment, on grounds of fraud on the Court by attorneys, perjury by witnesses, & newly discovered evidence.

JURISDICTION

1. The jurisdiction of this Court is invoked under 28 U.S.C. Sec 1651(a) 1946, & Article 111 Sec 2, of U.S. Constitution. Ex parte Peru, 318 US 578, (1943), Adams v United States ex rel. McCann 317 US 269, (1942). Rule 54 of Rules of Supreme Court.

Notice of appeal from District Court's decision was filed December 13, 1976. The partial record was brought up to the Court of Appeals on December 30, 1976, & a temporary docket nr of T-6853 was given to petitioner. (District Court Clerk is searching for the lost documents).

2. The jurisdiction of this court is invoked under the inherent jurisdiction which all Courts have to protect the integrity of the judicial process, & under the supervisory powers of this Court on the lower Courts. Hazel-Atlas-Glass Co. v Hartford-Empire Co. 322 US 238, 1943.

QUESTIONS PRESENTED

1. Did the Court of Appeals for the second circuit have the power to demand a docketing fee, or an oath of forma pauperis from a seaman, who sued a steamship company for wrongful discharge, & who had previously had his case docketed in this Court, & in the Court of Appeals without paying the docket fee?

2. Does Rule 54 of Rules of the Supreme Court also apply to Courts of Appeal in all Circuits?

STATEMENT

1. On November 23, 1976, petitioner filed a 60(b) motion in District Court that had previously granted summary judgment twice in a seaman's action for wrongful discharge, dismissing his complaint, & seeking to vacate such final judgment on grounds of fraud by attorneys, newly discovered evidence, & perjury by witnesses.

2. On November 24, 1976, District Court denied such motion, without opinion & this was entered in docket file on November 26, 1976.

3. The motion consisted of an affidavit of seven pages, a legal memorandum of eleven pages, & partial excerpts of six pages of a separate Appendix which contained ninety-nine pages of Court documents from previous Court actions in State Court, Federal Court & U.S. Supreme Court. (R41) (this separate appendix has been lost in District Court.)

4. On December 3, 1976 defendant Central Gulf Lines, filed an affidavit in opposition, with two exhibits which were the District Court's opinion in the second summary judgment motion, & the second circuit Court of Appeals second decision after remand. (R42)

5. On December 7, 1976, petitioner filed reply pleadings. (R43)

6. On December 13, 1976, petitioner filed notice of appeal to second circuit Court of Appeals in District Court.

7. District Court clerk informed petitioner the record was in warehouse & he would endeavour to get the record in about a weeks time.

8. On December 30, 1976, the record in District Court, minus the missing exhibits & other documents were filed in the Court of Appeals, & petitioner was given a temporary docket nr T-6853, without paying the

docketing fee in District Court or the Court of Appeals, after explaining to both clerks that this action had been previously appealed without payment of docketing fees.

9. On January 17, 1977, petitioner filed a motion in Court of Appeals seeking a summary reversal of District Court's denial of his Rule 60(b) motion.

10. By letter dated January 17, 1977, from pro se clerk, petitioner was notified that his motion would not be filed absent the docket fee or an oath of forma pauperis.

Petitioner contends that the refusal of the second circuit Court of Appeals to docket a seaman's case which had previously been appealed without payment of the fee, both in this Court & in the second circuit, prevents consideration of the fraud on the Court charged in petitioner's motion,

without consideration of the type of evidence on which the petitioner intended to rely, & prevents any effective action which Rule 60(b) was enacted to correct, & constitutes both an abuse of judicial power & abnegation of judicial duty & a means of defeating this Court's appellate jurisdiction, in a manner not remediable through the ordinary course of appeal. The ruling of the Court of Appeals is therefore one which this Court can & should correct by writ of mandamus.

REASONS FOR GRANTING THE WRIT

1. There is no other feasible way to review judicial disregard of the federal statute 28 USC Sec 1916, except by a writ of mandamus.

2. The second circuit Court of Appeals has decided an important question, concerning the power of circuit Courts of Appeal to prevent appeals being docketed by a

seaman without prepayment of costs & fees, in a way which is prohibited by statute, & is contrary to established custom & practice by this Court & every other Circuit Court of Appeals, including the second circuit.

3. The decision by the second circuit in refusing to docket appeal by a seaman was wrong, & negates the Congressional policy protecting seamen in over one hundred statutes enacted for their protection. It constitutes an usurpation of power not conferred on the Court to pick & choose which seamen's cases shall be docketed without prepayment of fees & costs.

POINT 1

THERE IS NO OTHER FEASIBLE WAY TO REVIEW JUDICIAL DISREGARD OF THE FEDERAL STATUTE 28 USC Sec 1916, EXCEPT BY A WRIT OF MANDAMUS.

It is an elementary rule that a writ of mandamus may be used to require an

inferior court to decide a matter within its jurisdiction & pending before it for judicial determination, but not to control its decision. Ex parte Flippin, 94 US 350; Ex parte R. Co. 101 US 720; Ex parte Burtis 103 US 238.

In McClellan v. Carland 217 US 268, (1910) it was recognized that mandamus became available where the decision of the lower court might otherwise defeat appellate jurisdiction-

"We think it is the true rule that where a case is within the appellate jurisdiction of the higher court, a writ of mandamus may issue in aid of appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."

The sole function of the writ is to require the court to act where it has refused to do so. Ex parte Davenport 6 Pet

(US) 661; Ex parte Newman, 14 Wall (US) 152, Virginia v. Rines 100 US 313.

The traditional use of "mandamus" in aid of appellate jurisdiction, both at common law & in federal courts, has been to confine an inferior court to lawful exercise of its prescribed jurisdiction, or to compel it to exercise its authority when it is its duty to do so. In Roche v. Evaporated Milk Assn. 319 US 21, (1943).

POINT 11

THE SECOND CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION, CONCERNING THE POWER OF CIRCUIT COURTS OF APPEAL TO PREVENT APPEALS BEING DOCKETED BY A SEAMAN, WITHOUT PAYMENT OF COSTS & FEES, WHICH IS AUTHORIZED BY STATUTE, & HAS BEEN THE PRACTICE & CUSTOM IN THIS COURT & EVERY OTHER CIRCUIT COURT OF APPEALS, INCLUDING THE SECOND CIRCUIT.

In Thielebeule v. Wordsee Pilot 1972 AMC 50-

Where two statutory provisions conflict, the specific provision must be deemed to control over the general one.

In light of the Congressional policy underlying provisions of the Judicial Code dealing with seaman's action in general, & 28 USC Sec 1916 in particular, Sec 1916 must be read as exempting seaman from prepaying the "expenses" listed in Sec 1921-Reversed, J Hays, Moore, & Mulligan (2^d Cir).

The court below was not authorized to circumvent, by demanding a docket fee, or an oath of forma pauperis, the policy established by Congress, in Title 28 Sec 1916, that seamen may proceed without prepayment of fees or costs or furnishing security thereof. See petitioner's previous appeals in this Court & 2nd circuit where fees were not paid. Peltzman v.

Central Gulf Lines 497 F2^d 332 (2d Cir 1974) aff'd following remand, 523 F2^d 96 (2d Cir 1975) cert den, 423 US 1074, 1976, rehearing den 424 US 979, 1976.

POINT 111

THE DECISION BY THE SECOND CIRCUIT IN REFUSING TO DOCKET APPEAL BY A SEAMAN WAS WRONG, & NEGATES THE CONGRESSIONAL POLICY PROTECTING SEAMEN IN OVER ONE HUNDRED STATUTES ENACTED FOR THEIR PROTECTION. IT CONSTITUTES A USURPATION OF POWER, NOT CONFERRED ON THE COURT TO PICK & CHOOSE WHICH SEAMAN'S CASE SHALL BE DOCKETED WITHOUT PREPAYMENT OF FEES & COSTS.

See Michigan Law Review Vo 52 479-, 1954-Norris- "Seaman as Wards of Admiralty" containing statutory, historical & decisional basis for rejecting 2nd circuits refusal to docket petitioner's case, as being contrary to the spirit, letter & statutes of the general maritime law.

In Bulk Carriers v Arquelles 400 US 358, 1971, this Court has held that the statutory sections of the General Maritime Law controls a seaman's employment & conditions of employment.

In La Buy v. Howes Leather Co 352 US 249, "district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court" as to which mandamus was a proper remedy "as a means of policing compliance with the procedural rules." Will v. US 389 US 96.

See US Alkali Export Assn. v. US 325 US 196, 1945-ordinary hardship to litigant plus "frustration of Congressional Policy" justifies writ cf Kanatser v. Chrysler Corp 199 F2^d 610, (1952) cert den 344 US 921, 1953.

See Ex parte Abdu 247 US 27, 1918- Clerk of Court of Appeals declined to file record without deposit to secure costs &

see Semel v. US 158 F2^d 231, 1946, application to require district clerk to transmit notice of appeal.

Object of "mandamus" is to enforce duty which law requires respondent to perform. Hazen v. Harde~~e~~ 78 F2^d 230.

Finally petitioner argues that the integrity of the judicial process & the due process owed to a litigant who is charging that his pleadings have been ignored both in District Court & in the second appeal in Circuit Court of Appeals, that fraud on the court has been practiced by attorney's involved in this case, with an abnegation of the judicial responsibility to inquire & protect the integrity of the court's proceedings.

Prof. Moore defines "fraud upon the Court" as "that species of fraud perpetrated by officers of the Court so that the judicial machinery can not perform in the usual manner its impartial

task" (7 Moore Sec 60:33 at 512).

See Hazel-Atlas Glass Co v. Hartford-Empire Co (supra). See petitioner's Reply Brief in Peltzman v. Central Gulf Lines, October term 1975 US Supreme Court, No 75-782 for specifics of issues of fraud, perjured testimony, & a blatant disregard of the Federal Rules of Civil Procedure & Summary Judgment Rule (p 5).

CONCLUSION

Wherefore, petitioner prays:

1. That a writ of mandamus issue from this Court directed to the Honorable US Court of Appeals for the second circuit, & to the Honorable Chief Judge Irving R. Kaufman, of said court, requiring said Honorable Irving R. Kaufman, to show cause on a day to be fixed by this court why mandamus should not issue from this court directing said Honorable Irving R. Kaufman, to docket petitioner's appeal & to consider his motion for a summary

reversal of the District Courts decision denying his motion to vacate a final judgment under Rule 60(b).

2. That petitioner have such additional relief & process as may be necessary and appropriate in the premises.

Respectfully submitted

Archie Peltzman
Archie Peltzman
Petitioner, Pro Se

February 2, 1977

APPENDIX A

DANIEL FUSARO
CLERK

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

January 17, 1977

Archie Peltzman
c/o Eve Katz
2428 W. 16th Street
Brooklyn, New York 11214

Re: T-6853

Dear Sir:

This will acknowledge receipt of your motion papers dated January 17, 1977.

Please be advised that we are unable to file them absent a check for \$50.00 or a motion for leave to proceed in forma pauperis. We will retain your appellate papers in our files awaiting advice from you.

Sincerely,

Olga Valentine
Olga Valentine
pro se law clerk's office

opv